IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jim Bleyenberg,	:	
Plaintiff	:	Civil Action 2:12-cv-00777
v.	:	
D&N Masonry, Inc., *et al.*,	:	Magistrate Judge Abel
Defendants	:	

ORDER

Plaintiff Jim Bleyenberg brings this action against defendants D&N Masonry, Inc., Don DeBello, Nick DeBello, and Cathy DeBello ("D&N and the DeBello defendants") and Venture One Construction, Inc. ("Venture") for recovery of wages. Plaintiff seeks back pay, treble damages, interest, and reimbursement of his costs and attorney fees incurred in prosecuting this action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, Ohio's Minimum Fair Wage Standards Act, Ohio Rev. Code Chapter 4111, and the Minimum Wage Amendment to the Ohio Constitution.

A hearing on defendant's objections to the Magistrate Judge's May 3, 2013 Report and Recommendation was held on May 23, 2013. Defendant argues that under Ohio Revised Code § 2715.50, attachment is not proper because plaintiff has not shown one of the following prerequisites to attachment:

> A creditor may bring an action on his claim before it is due and have an attachment against the property of the debtor when any of the following applies:
> (A) A debtor has sold or otherwise transferred or disposed of his property with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts;
> (B) A debtor is about to make such a sale or other transfer or disposition of his property, with such fraudulent intent;
> (C) A debtor is about to remove his property, or a material part of it, with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts.

Ohio Rev. Code § 2715.50. Bleyenberg brought his claim *after* the wages were due, section 2715.50 concerns the circumstances when attachment is permitted *before* a debt is due and is not applicable to this case.

This case is governed by the prejudgment attachment procedures outlined in section 2715.03. Under section 2715.01, a claim for work or labor is one basis for attachment. Other grounds for attachment are similar to those provided in section 2715.50. Section 2715.01 requires only that the plaintiff prove one of the enumerated grounds for prejudgment attachment. Plaintiff has proved that his claim is for work or labor. He has offered evidence proving that defendants owe him the wages. That entitles him to the attachment. Defendant's objections to the Report and Recommendation are DENIED.

On May 1, 2013, plaintiff served a subpoena on D&N Masonry, Inc. commanding it to appear and testify at the hearing before the Magistrate Judge and produce the documents listed in exhibit A to the subpoena. D&N Masonry, Inc. failed to appear at the hearing. Therefore, Don Debello, President of D&N Masonry, Inc., was ordered to show cause on or before May 10, 2013 why D&N Masonry, Inc. should not be held in contempt for failing to comply with the subpoena. On May 10, 2013 D&N Masonry filed a notice with the Court indicating its compliance with the subpoena. At the hearing, plaintiff reported that D&N Masonry's submissions were incomplete. Specifically, in request No. 3, plaintiff sought all of D&N Masonry's bank statements from all accounts that itemize credits and debits, including cashed checks and check numbers from date of hire to present. Plaintiff maintains that he only received statements from May 2012 through December 2012. Request No. 4 sought copies of all executor/pending construction contracts, but plaintiff maintains that he discovered two additional contracts that had not been disclosed. Request No. 8 sought documents depicting all equipment owned without encumbrances by D&N Masonry, including documentation describing the location and expected location for the next 30 days. Plaintiff maintains the 2011 depreciation schedule was insufficient and that there was no information concerning what equipment defendant owned in 2012 and 2013. Request No. 9 sought copies of documents submitted to any contracting entity requesting payments for services from June 1, 2012.

Counsel for D&N Masonry stated that he would confirm with his client that no further documents were available with respect to the requests listed above. Counsel for defendant should confirm whether the accountant has any copies of paychecks or paystubs or other itemizations of the wages D&N Masonry paid its employees. Counsel should also confirm that there are no security agreements covering any of D&N

Masonry's assets. D&N Masonry is ORDERED to supplement its responses within fourteen days of the date of this Order.

Counsel for the parties are ORDERED to provide the Court with a joint status report as to these requests no later than June 17, 2013.

At the May 3, 2013 hearing, plaintiff provided the court with an Application and Certificate for Payment from D&N Masonry, Inc., which was submitted on April 22, 2013 to Howard Immel, Inc. for work performed on the construction of a Walmart New Supercenter in South Euclid, Ohio. The Application and Certificate for Payment seeks payment of $20,000. Howard Immel, Inc. has a retainage of $54,702.52. The balance remaining, including the retainage, is $497.084.55.

Plaintiff seeks $14.557.00 for unpaid wages and statutory penalties/damages and $18,000.00 in attorney fees. It is ORDERED that as monies become due and owing by Howard Immel, Inc. to D&N Masonry, the monies should be attached and paid to the Clerk of Court for the Southern District of Ohio. The Magistrate Judge further ORDERS that no monies be paid to D&N Masonry, Inc. by Howard Immel, Inc. until $32,557.00 has been paid to the Clerk of Court.

Plaintiff seeks the return of the mileage and witness fees for the deposition of D&N Masonry that did not take place. Defendant is ORDERED to return the check or reimburse plaintiff within ten (10) days of the date of this Order.

Plaintiff Jim Bleyenberg's April 12, 2013 motion for prejudgment attachment of defendant D&N Masonry, Inc.'s assets under Rule 64 of the Federal Rules of Civil Procedure and Ohio Revised Code § 2715.045 (doc. 51) is GRANTED.

The Clerk of Court is DIRECTED to mail a copy of this Order and Report and Recommendation by certified mail to:

Howard Immel, Inc.
c/o Lauren Hentz, Contracts Administration
1820 Raddison Street
Green Bay, Wisconsin 54302

National Corporate Research
Statutory Agent for Howard Immel, Inc.,
4568 Mayfield Road, Suite 204
Cleveland, Ohio 44121

Howard Immel, Inc.
Walmart Superstore Construction Site
1868 Warrensville Center Road
South Euclid, Ohio 44121

s/Mark R. Abel
United States Magistrate Judge